5.60 RETALIATION UNDER EMPLOYMENT DISCRIMINATION STATUTES

Introductory Comment

The following instructions are designed for use in cases where the plaintiff alleges that he or she was discharged or otherwise retaliated against because he/she opposed an unlawful employment practice, or "participated in any manner" in a proceeding under one of the discrimination statutes. (See, e.g., 42 U.S.C. § 2000e-3(a)). Title VII, the Age Discrimination in Employment Act, The Americans With Disabilities Act, the Family and Medical Leave Act, and other federal employment laws expressly prohibit retaliation against employees who engage in "protected activity." See, e.g., 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 1223 (ADA); 29 U.S.C. § 2615 (FMLA). In addition, 42 U.S.C. § 1981 has been construed to prohibit retaliation against employees who engage in protected opposition against racial discrimination. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997).

The following illustration is patterned on a situation where the plaintiff claims retaliation based on his or her opposition to race discrimination or racial harassment.

5.61 RETALIATION FOR PARTICIPATION IN PROCEEDINGS UNDER EMPLOYMENT STATUTES

Your verdict must be for the plaintiff and against the defendant on the plaintiff's retaliation claim if all the following elements have been proved by the [(greater weight) or (preponderance)][1] of the evidence:

First, plaintiff [filed an EEOC charge alleging (race discrimination)][2] and

Second, defendant (discharged)[3] plaintiff; and

Third, plaintiff's [filing of an EEOC charge] was a [(motivating) or (determining)][4] factor in defendant's decision to (discharge) plaintiff.

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim. In addition, your verdict must be for the defendant if defendant has proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have (discharged) plaintiff even if plaintiff had not (filed an EEOC charge).

NOTES ON USE

1. Select the bracketed language which corresponds to the Burden of Proof instruction.

2. Select the appropriate terms depending upon whether plaintiff's underlying complaint involved discrimination based on race, gender, age, disability, etc.

3. Select the appropriate term depending upon whether the alleged retaliatory action involved discharge, demotion, failure to promote, etc.

4. See Committee Comments regarding applicability of the motivating factor/same decision format.

5.62 RETALIATION FOR OPPOSITION TO DISCRIMINATION

Your verdict must be for the plaintiff and against the defendant on the plaintiff's retaliation claim if

all the following elements have been proved by the [(greater weight) or (preponderance)][1] of the evidence:

First, plaintiff complained to defendant that (he/she) or (name of third party) was being (harassed/ discriminated against) on the basis of (race)[2]; and

[*Second*, plaintiff reasonably believed that [(he) (she) (name of third party)][3] was being (harassed/discriminated against) on the basis of (race)];[3] and

[*Second, Third*], defendant (discharged)[4] plaintiff; and

Fourth, plaintiff's [complaint of (race discrimination) (racial harassment)] was a [(motivating) or (determining)][5] factor in defendant's decision to (discharge) plaintiff.

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim. In addition, your verdict must be for the defendant if defendant has proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have (discharged) plaintiff even if plaintiff had not (complained about discrimination).

NOTES ON USE

1. Select the bracketed language which corresponds to the Burden of Proof instruction.

2. Select the appropriate term depending on whether plaintiff's underlying complaint involved harassment or allegedly discriminatory employment decision, and whether the underlying complaint was based on race, gender, age, disability, etc.

3. Plaintiff does not need to prove that the underlying employment practice by the employer was, in fact, unlawful. Instead, employees are protected if they opposed an employment practice which they reasonably and in good faith believe to be unlawful. Only submit this paragraph if there is evidence to support a factual dispute as to whether plaintiff was complaining of or opposing discrimination in good faith. (See Committee Comments, below).

4. Select the appropriate term depending upon whether the alleged retaliatory action involved discharge, demotion, failure to promote, etc.

5. See Committee Comments regarding applicability of the motivating factor/same decision format.

Committee Comments

This instruction is designed to submit the issue of liability in a retaliation case under Title VII and other federal discrimination laws. Retaliation claims require proof of three essential elements: (1) "protected activity" by the plaintiff; (2) subsequent "adverse employment action" by the employer; and (3) a causal connection between the palintiff's protected activity and the adverse employment action. *Sowell v. Alumina Ceramics, Inc.*, __F.3d__ (8th Cir. June 1, 2001); *Borgen v. Minnesota*, 236 F.3d 399 (8th Cir. 2000); *Cross v. Cleaver*, 142 F.3d 1059 (8th Cir. 1998); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997).

Protected Activity: Opposition

A retaliation plaintiff does not need to prove that the underlying employment practice by the employer was, in fact, unlawful; instead, employees are protected from retaliation if they oppose an

employment practice which they reasonably and in good faith believe to be unlawful. See *Clark County School District v. Breeden*, __U.S.__, 121 S.Ct. 1508 (April 23, 2001); *Wentz v. Maryland Cas. Co.*, 869 F.2d 1153, 1155 (8th Cir. 1989) (ADEA case: "Contrary to the district court's ruling . . . to prove that he engaged in protected activity, Wentz need not establish that the conduct he opposed was, in fact, discriminatory.").

In order to be "protected activity," the employee's complaint must relate to unlawful employment practices; opposition to alleged discrimination against students or customers is not protected because it does not relate to an unlawful employment practice. *Artis v. Francis Howell*, 161 F.3d 1178 (8th Cir. 1998). As a general proposition, however, the threshold for engaging in "protected activity" is fairly low: the touchstone is simply whether the employee had a reasonable, good faith belief that the employer had committed an unlawful employment practice. *Stuart v. General Motors Corp.*, 217 F.3d 621, 634 (8th Cir. 2000); *Buettner v. Eastern Arch Coal Sales Co.*, 216 F.3d 707, 714 (8th Cir. 2000); *Wentz*, *supra*, 869 F.2d at 1155.

Protected Activity: Participation

In addition to prohibiting retaliation based on an employee's "opposition" to what he/she reasonably believes to be an unlawful employment practice, Title VII and other federal employment laws protect employees from retaliation based on their "participation" in proceedings under these statutes. E.g., 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203 (ADA). *Cross v. Cleaver*, *supra*, 142 F.3d at 1071. Protected "participation" appears to include filing a charge with the EEOC (or a parallel state or local agency), filing a lawsuit under one of the federal employment statutes, or serving as a witness in an EEOC case or discrimination lawsuit. Unlike "opposition" cases, employees

who "participate" in these proceedings appear to have absolute protection from retaliation, irrespective of whether the underlying claim was made reasonably and in good faith. *Benson v. Little Rock Hilton Inn*, 742 F.2d 414 (8th Cir. 1984).

Adverse Employment Action

"Typically, it is obvious whether an employer took adverse employment action when, for example, the employee has been terminated or discharged. However, retaliatory conduct "may consist of action less severe than outright discharge." *Kim v. Nash Finch Co.*, *supra*, 123 F.3d at 1060. *Ross v. Douglas County, Nebraska*, 234 F.3d 391, 395 (8th Cir. 2000) (Even though plaintiff did not suffer any change in benefits or salary, plaintiff's reassignment to the "bubble," a position Douglas County routinely rotated employees through because of stressful nature of the duties, sufficiently adverse); *Davis v. City of Sioux City*, 115 F.3d 1365, 1369 (Plaintiffs transfer to a less desirable property officer position submissible, despite defendant's argument that plaintiff received a salary increase). Compare, *LePique v. Hove*, 217 F.3d 1012 (8th Cir. 2000) (holding that failure to transfer plaintiff to a job that did not entail a change in salary, benefits or other aspects of employment is not sufficient "adverse" action).

Causal Connection

In most retaliation cases which proceed to trial, the focal issue is whether there is a causal connection between the plaintiff's protected activity and the employer's adverse employment action. It has been held that timing alone may be insufficient to establish causation. Compare *Bradley v. Widnall*, 232 F.3d 626 (8th Cir. 2000); *Scroggins v. University of Minnesota*, 221 F.3d 1042 (8th Cir. 2000), with *Bassett v. City of Minneapolis*, 211 F.3d 1097, 1105 (8th Cir. 2000); *Smith v. St. Louis University*, 109 F.3d 1261, 1266 (8th Cir. 1997) ("Passage of time between events does not by itself foreclose a claim

of retaliation"). The proximity between the plaintiff's protected activity and the employer's adverse employment action often is a strong circumstantial factor. *Smith*, 109 F.3d at 1266; *Bassett*, 211 F.3d at 1105.

Standard for Causation

[Under Title VII, as amended by the Civil Rights Act of 1991, the standard for causation to establish liability is whether discriminatory intent was "a motivating factor" in the employer's decision. 42 U.S.C. § 2000e-2(m); see also *Pedigo v. P.A.M. Transp. Inc.*, 60 F.3d 1300 (8th Cir. 1995) (applying "motivating factor" causation standard in ADA case). In (*Norbeck v. Basin Elec. Power Co-op*, 215 F.3d 848, 852 (8th Cir. 2000), a case under the False Claims Act, the court noted that the Civil Rights Act of 1991 established a "motivating factor" standard for liability in the Title VII discrimination cases, but it did not modify the then-existing standard for liability in Title VII retaliation cases. [CITE TO BE ADDED]. Accordingly, even under Title VII, the standard for liability may require that retaliation was a "determining factor" in the employer's challenged decision. [CITE TO BE ADDED]. The Eighth Circuit has not ruled on this issue as of the publication date for these instructions.

Remedies and Verdict Forms

Lawyers and judges should utilize the damages instructions and verdict forms which apply to the type of discrimination in question. In other words, in a Title VII retaliation case (and subject to the causation standard issue discussed above), the court should use Model Instruction 5.01A et seq.; in an ADEA retaliation case, the court should use Model Instructions 5.11 et seq.; and so on.